THIYAGARASA

v.

ARUNODAYAM

COURT OF APPEAL.
G. P. S. DE SILVA, J. (PRESIDENT, C/A) AND, GOONEWARDENA, J.
C. A. 642/76 (F).
D. C. JAFFNA L/5261.
MAY 18, 19 AND 20, 1987.

Deed–Validity–Requirement of due execution of deed–Wrong date of execution–Notaries Ordinance s. 31–Deed executed pending partition case–Partition Act. s. 67(1).

Held–

(1) The essential elements of due execution of a deed as set out in section 2 of the Prevention of Frauds Ordinance are:

(*a*) The deed must be signed by the party making it.
(*b*) It must be signed in the presence of a licensed notary public and two or more witnesses.
(*c*) The notary public and the witnesses must be present at the same time.
(*d*) The execution of the deed must be duly attested by the notary and the witnesses.

The notary is as much an attesting witness as the two witnesses themselves.

(2) Where the requirements of the Prevention of Frauds Ordinance have been complied with the mere fact that the notary has inserted a false or wrong date of its execution does not render the deed void.

(3) The lapse of the notary may render him liable to be prosecuted for contravention of the provisions of the Notaries Ordinance.

(4) The prohibition against alienation pending partition contained in s. 67(1) of the Partition Act applies only to a partition action which is duly registered as a lis pendens under the Registration of Documents Ordinance".

(5) Where the purchase pending partition was by the plaintiff himself the plaintiff cannot be permitted to take advantage of his own wrongful act.

Cases referred to:

(1) *Kiribanda v. Ukkuwa–1 SCR 216.*

(2) *Subaseris v. Prolis–(1913) 16 NLR 393.*

APPEAL from judgment of the District Court of Jaffna.

Dr. H. W. Jayewardene, Q.C. with *K. Kanag Iswaran* and *Miss Keenavinne* for defendant-appellants.

H. L. de Silva, P.C. with *S. Mahenthiran* for plaintiff-respondent.

July 3, 1987.

G. P. S. DE SILVA, J.

The plaintiff instituted this action seeking a declaration that deed No. 962 dated 14th January 1973 attested by K. Somaskandan, Notary Public, (P3) is invalid and is of no force or avail in law. The impugned deed P3 was a deed of transfer of a divided extent of a land called "Karaiyantoddam and Mutatikinattodi" executed by the plaintiff and her deceased husband in favour of the 2nd defendant. The grounds upon which the plaintiff sought the declaration were:–(i) that the land purported to be conveyed on the deed was not the land that was intended to be conveyed by the vendors; (ii) want of due execution as required by law; (iii) that the deed was in fact executed on 7th October 1972 when partition action No. P/1418 of the District Court of Jaffna was pending in respect of the larger land.

After trial, the District Judge held with the plaintiff on grounds (i) and (ii) above and against the plaintiff on ground (iii). He accordingly entered judgment for the plaintiff. The defendants (husband and wife) have now lodged this appeal against the judgment and decree of the District Court.

Mr. H. L. de Silva, counsel for the plaintiff-respondent, did not seek to support the finding of the trial Judge on ground (i). Counsel, however, supported the finding in his client's favour on ground (ii) and further contended that the trial Judge was in error when he found

against the plaintiff on the third ground. In this appeal, therefore, we are concerned only with the second and third grounds of avoidance relied on by the plaintiff.

Considering first the question whether P3 was void by reason of want of due execution as required by law, it is relevant to note that the trial Judge reached the finding that although the deed on its face bears the date 14th January 1973 as the date of its execution, yet in truth the actual date of execution was 7th October 1972 as claimed by the plaintiff. This finding, which was amply supported by the evidence, was not challenged at the hearing before us by Dr. Jayewardena, counsel for the defendants-appellants. Dr. Jayewardena, however, submitted that P3 was a valid deed of transfer inasmuch as there was no failure to comply with the imperative provisions of section 2 of the Prevention of Frauds Ordinance and that the fact that the date of execution given in the deed was false or incorrect does not render the deed of no force or avail in law. On the other hand, Mr. H. L. de Silva for the plaintiff-respondent relying on rule (20) in section 31 of the Notaries Ordinance contended that it was the duty of a notary to "duly attest" every deed executed before him *"without delay"*. Mr. de Silva argued that the expression "without delay" meant "promptly" and that in the present case there was a delay of three months between the date of actual execution (7.10.72) and the date of attestation (14.1.73) by the Notary. In short, Mr. de Silva's submission was that due attestation by the Notary contemplated in section 2 of the Prevention of Frauds Ordinance and the formal attestation stipulated in rule (20) of section 31 of the Notaries Ordinance constitute one composite legal act.

Before I deal with the provisions of law, it is not inappropriate to refer briefly to certain facts pertaining to the impugned transaction embodied in P3. Admittedly, the plaintiff received from the defendants the entire consideration agreed upon between the parties. Although there was an allegation in the plaint that "a fraud had been perpetrated" on the plaintiff and her late husband by the defendants there was no evidence whatsoever on record to support such an allegation. Moreover, the land which was the subject matter of the sale was subject to two mortgages which were redeemed with the moneys received by the plaintiff from the defendants on account of the sale. Thus it is clear that the plaintiff received the full benefit of the transaction and it would appear that this action was instituted on

account of a dispute between the parties over the correctness of one of the boundaries of the land. Here again, it is to be observed that the schedule to P3 describes the land not only by its extent and metes and bounds but also with specific reference to a plan. The sale was both ad corpus and ad quantitatem.

So much in relation to the facts; the question then is whether in law the deed is void by reason of the fact that it bears a false or wrong date of its execution. It may not be irrelevant to observe that the date of execution is something which the notary inserts in the deed and is not a matter within the control of the parties to the transaction. This is a matter which has some bearing on the question whether the rules relating to due execution contained in section 31 of the Notaries Ordinance are imperative or not.

The governing provision of law is contained in section 2 of the Prevention of Frauds Ordinance and the essential elements of "due execution" relevant for present purposes are (*a*) that the deed must be signed by the party making the same; (*b*) it must be signed in the presence of a licensed notary public and two or more witnesses; (*c*) the notary public and the witnesses must be present at the same time; (*d*) the execution of the deed must be duly attested by the notary and the witnesses. Admittedly, the requirements set out in (*a*), (*b*) and (*c*) above were satisfied in the instant case. There remains the question whether there was compliance with the requirement stipulated in (*d*). It is not in dispute that the notary himself placed his signature in the presence of the executants (plaintiff and her deceased husband) and the two witnesses. This fact, in my view, is sufficient for what is contemplated by the law is that just as the witnesses must bear witness to the fact of execution of the deed, the notary too must bear witness to the same fact, i.e. the fact of execution of the deed by the executant. The collocation of the words "by such notary and witnesses" in section 2 supports the view that the notary is as much an attesting witness as the two witnesses themselves.

This question has received judicial consideration in *Kiribanda v. Ukkuwa*,(1). Said the learned Chief Justice Burnside "The law applicable to the deed before us requires that the same shall be signed by the party making the same in the presence of a licensed notary public, and two or more witnesses present, and the deed 'shall be duly attested by such notary and witnesses'. Now to this deed is appended the word 'witnesses' and under it there are the signatures of two

witnesses and of the notary J. H. E. Mudiyanse, Notary Public. *This seems to me to be all that the law requires* . . . . .The learned District Judge has said that the 'first signature below that of the witnesses was surplusage'. I cannot subscribe to that position . . . . . .I emphatically hold that it was all that was necessary to do in satisfaction of the provisions of the Frauds Ordinance requiring the attestation by a notary and two witnesses. . . . . .It is not only not superfluous but, to say the least of it, standing alone it satisfies the Frauds Ordinance and becomes the signature of an attesting witness, although of a designated and requisite character and calling. . . . . ."

Moreover, in view of Mr. de Silva's submission, it is relevant and significant to note that in the same judgment Burnside C.J. draws a distinction between due attestation by the notary contemplated in section 2 of the Prevention of Frauds Ordinance and the formal attestation of the notary which is provided for in the rules "laid down for the guidance of notaries" in the then Notaries Ordinance 16 of 1852. The learned Chief Justice concludes that the failure to comply with the latter does not "make the deed invalid".

Certain passages in E. R. S. R. Coomaraswamy's The Conveyancer and Property Lawyer, Vol. I, Part I which appear to run counter to the case for the plaintiff may be usefully cited here. "The Notaries Ordinance requires the notary attesting a deed to append a formal attestation to the deed. The absence of this attestation clause will not invalidate the deed but will render the notary liable to a statutory penalty . . . . . .Only the formalities required by section 2 (of the Prevention of Frauds Ordinance) are absolutely essential. If these requirements are fulfilled the failure to observe the other requirements of the Ordinance or any other Ordinance, such as the Notaries Ordinance, will not invalidate the deed . . . . . " (Page 12). In the same work, at page 94 the learned author states "The formal attestation by the notary is not part of the deed but it is the duty of the notary to append it".

I accordingly hold that once it is established that the requirements of section 2 of the Prevention of Frauds Ordinance relating to the execution of the deed have been complied with, the mere fact that the notary has inserted a false or wrong date of its execution does not render the deed void. The lapse on the part of the notary does not touch the validity of the deed but may render the notary liable to be prosecuted for contravention of the provisions of the Notaries

Ordinance. This seems reasonable and just for the parties to the transaction have no control over the act of the notary who is a professional man. I am therefore of the opinion that P3 is valid and effective to transfer the legal title to the property and is not bad for want of due execution.

I now turn to the issue whether P3 was invalid as it was executed on 07.10.72 when partition action P/1418 was pending in the District Court of Jaffna. The District Judge took the view that this matter was governed by the provisions of the Administration of Justice (Amendment) Law No. 25 of 1975 but, at the hearing before us, counsel on both sides agreed that this was an erroneous view and the relevant law was found in section 67 of the Partition Act (Chap. 69).

It is common ground that (*a*) the plaintiff and her late husband instituted partition action P/1418 in the District Court of Jaffna on 6th March 1971; (*b*) the plaintiff was entitled to an undivided 5/6th share of the land while the remaining 1/6th share was owned by one J. Rasanayagam; (*c*) that on deed No. 954 of 26th October 1972 (P4) the plaintiff bought the 1/6th share from Rasanayagam; (*d*) that the partition action was withdrawn by the plaintiff and her late husband and was dismissed on 1st November 1972. On these facts Mr. de Silva argued that the deed P4 was invalid as it was executed pending the partition action and that the impugned deed P3 which was also executed pending the partition action was invalid, for what was transferred on P3 was in effect an undivided share although the deed purports to transfer a divided extent. I am afraid this contention is not well-founded for, as rightly submitted by Dr. Jayewardene, the prohibition against alienation contained in section 67(1) of the Partition Act applies only to a partition action which "is duly registered as a lis pendens under the Registration of Documents Ordinance". This is an essential element of the section and on a scrutiny of P2 (certified extract of the entries under Registration of Documents Ordinance) it was clear that there was no proof that the lis pendens was registered in, or in continuation of the folio in which the first registered instrument affecting this land was registered. I did not understand Mr. de Silva to contend that there was proof that the partition action was duly registered as a lis pendens. A party relying on a provision such as this must establish the elements postulated in the section for, as observed by Wood Renton ACJ in *Subaseris v. Prolis*,(2) with reference to section 17 of the Partition Ordinance:- "It must be remembered that section 17 of the Partition Ordinance imposes a fetter on the free

alienation of property and the courts ought to see that that fetter is not made more comprehensive than the language and the intention of the section requires."

Dr. Jayewardene further contended that there was a broader ground which militated against the plaintiff relying on section 67 of the Partition Act. The partition action itself was one filed by none other than the plaintiff and her late husband. They themselves bought 1/6th share of the land on P4 and sold a divided extent on P3, being fully aware that the partition action was pending. In these circumstances it seems to me that the principle that a party to a suit cannot be permitted to take advantage of his own wrongful act and that a court would not lend its assistance to such a party to obtain relief is applicable. On this basis too the plaintiff's reliance on section 67 of the Partition Act is misconceived.

I therefore hold that both grounds of avoidance relied on by the plaintiff fail. In the result, I would allow the appeal, set aside the judgment and decree of the District Court, and dismiss the plaintiff's action with costs. The defendants are entitled to the costs of appeal fixed at Rs. 210.

GOONEWARDENE, J.—I agree.

Appeal allowed.